**RECORD NOS. 15-1125(L); 15-1171**
**[ORAL ARGUMENT HAS NOT BEEN SCHEDULED]**

# In The
# United States Court Of Appeals
# For The D.C. Circuit

**MCKENZIE-WILLAMETTE REGIONAL MEDICAL CENTER ASSOCIATES, LLC, DOING BUSINESS AS MCKENZIE-WILLAMETTE MEDICAL CENTER,**
***Petitioner/Cross-Respondent,***

**v.**

**NATIONAL LABOR RELATIONS BOARD,**
***Respondent/Cross-Applicant.***

**ON APPEAL FROM**
**THE NATIONAL LABOR RELATIONS BOARD**

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## REPLY BRIEF OF PETITIONER/CROSS-RESPONDENT

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# GLOSSARY

| TERM | DESCRIPTION |
|---|---|
| AB | Answering Brief filed by the Respondent / Cross-Applicant, NLRB |
| PB | Principal Brief filed by the Petitioner / Cross-Respondent, McKenzie-Wilamette |

## PRELIMINARY STATEMENT

As the Petitioner / Cross-Respondent in the above-captioned cases, McKenzie-Willamette Regional Medical Center Associates, LLC d/b/a McKenzie-Willamette Medical Center (hereafter, "McKenzie-Willamette" or the "Hospital") hereby replies, by and through the Undersigned Counsel, to the Answering Brief (hereafter, for the sake of citation, the "AB") filed by the Respondent / Cross-Applicant, the National Labor Relations Board (hereafter, the "Board"), to McKenzie-Willamette's Principal Brief (hereafter, for the sake of citation, the "PB") in support of the Hospital's Petition for Review of the Board's Decision and Order in McKenzie-Willamette Regional Medical Center Associates, LLC d/b/a McKenzie-Willamette Medical Center, 362 NLRB No. 20 (February 25, 2015) (hereafter, the "Decision").

## STATUTES AND REGULATIONS

All applicable statutes, etc. are reproduced in the Petitioner's Principal Brief.

## SUMMARY OF ARGUMENT

The Board requests that the Court "summarily affirm" the finding that McKenzie-Willamette unlawfully failed to provide the Union with all of the information sought by the Union in the context of the parties' efforts to reach a successor collective bargaining agreement. See AB, page 16. Yet, the Board has not challenged the Hospital's assertion that, to the extent Mr. Hooks' appointment

and / or transfer took place during the period of time the Board lacked the necessary quorum, the Decision would be a nullity. The Board has described McKenzie-Willamette's position that Mr. Hooks' appointment and transfer took place during the no-quorum period as "vain" and an "attempt to impugn the integrity of the Board's internal processes." See AB, pages 13, 21. These unduly harsh characterizations of the Hospital's position serve no purpose, as the fact remains that, by virtue of the agency's own documents, Mr. Hooks' appointment and transfer were reported, both to a U.S. Court of Appeals and the public at large, as taking place during the period of time the Board lacked the authority to appoint Regional Directors.

In response to the Hospital's position that the determination of Mr. Hooks' appointment and transfer dates should have been confined to these documents, as the only evidence in the record at the time the record closed, the Board castigates the value, if not the legitimacy of the evidence and seeks to point a finger of blame at the Hospital for what the Board views, in line with the position the agency must take in the case, as the poor state of the record on Mr. Hooks' appointment and transfer dates. In reality, however, the attempt to blame the Hospital is only an attempt, and a rather transparent one, to insulate the General Counsel from the clear errors made by Counsel for the General Counsel during the hearing before the Judge.

Moreover, as explained below, the Board's defense of the administrative notice taken of the Certificate of Appointment and Minute of Board Action is based upon the *non sequitur* that, because the documents should be deemed as self-authenticated under Fed. R. Evid. 902, the documents should also, automatically, not only work their way into the record by way of administrative notice, but also be taken as dispositive of the dispute over Mr. Hooks' appointment and transfer dates.

As part of the Answering Brief, the Board also unveiled a new, *post hoc* characterization of the Hospital's request to offer evidence of its own on Mr. Hooks' appointment and transfer dates, specifically, the agency termed the request a "fishing expedition." The Board's position that the Hospital did not describe the evidence ignores the specificity offered by the Hospital, but more importantly, proves too much, given the fact the General Counsel consistently resisted, ultimately with the Board's approval, the Hospital's efforts to review the agency's records, which, given the nature of the issue, were obviously the exclusive source of the relevant evidence. Thus, the fact McKenzie-Willamette did not fully meet the Board's *post hoc* expectations of specificity should come as no surprise.

Finally, the Board's contention that the Hospital waived any right to rely upon the Administrative Procedure Act ignores the fact the Hospital has referenced the statute not in the context of some new argument, but rather, as legal authority

to support the argument the Hospital made from the very moment the General Counsel belatedly reversed course on Mr. Hooks' appointment and transfer dates – to wit, the Hospital was deserving of an opportunity of its own to offer evidence on these keys facts. The Board's ongoing refusal to afford the Hospital such an opportunity has resulted in a violation of the Hospital's due process rights and subjected the Hospital to serious and substantial prejudice.

## ARGUMENT

### 1.) The Evidentiary Shortcomings Claimed by the Board Were the Fault of the General Counsel, Not McKenzie-Willamette

The Board does not deny that, at the time the record closed before the Judge, the uncontroverted evidence showed that Mr. Hooks' appointment took place during the period of time the Board lacked the necessary quorum. The Board seeks to discredit the evidence as "secondary" and goes so far as to suggest that McKenzie-Willamette is the party responsible for what the Board views as the poor state of the record from an evidentiary standpoint. See AB, pages 19 – 20. In reality, the Board's contentions are merely a smoke screen for the obvious errors made by the General Counsel as part of the hearing before the Judge and from which the agency has no point of rescue.

In any unfair labor practice proceeding before the Board, under the agency's own regulations, a respondent has the right, free of any condition, to amend the answer at any time prior to the hearing. See National Labor Relations Board,

Rules and Regulations, §102.23. As acknowledged by the Board (see AB, page 8), the Amended Answer was filed the day before the hearing convened before the Judge. Accordingly, under the agency's own regulations, the Amended Answer was timely and should not be used as a building block in the Board's argument that, somehow, the Hospital engaged in any blameworthy conduct.

Additionally, although the Board's regulations did not impose any obligation on McKenzie-Willamette to justify the timing of the Amended Answer, the Board recognizes that, as part of the proceedings before the agency, the Hospital provided an explanation as to why the Answer was amended in close proximity with the opening of the hearing. See AB, page 20, fn. 5. Specifically, the Amended Answer was prompted by the Decision issued by the United States Supreme Court in Noel Canning v. NLRB, -- U.S. --, 134 S. Ct. 2550, 189 L. Ed. 2d 538 (2014), whereby the Court resolved the nationwide controversy over the validity of President Obama's recess appointees, and by extension, the question of whether the Board lacked a quorum for a period of time. The Amended Answer was filed only twelve (12) days after the Decision was issued in Noel Canning v. NLRB, a period of time the Board does not question as reasonable in the circumstances. Instead, the Board contends that McKenzie-Willamette could have, and really should have, challenged the validity of Mr. Hooks' appointment and transfer at the very outset of the proceedings, insofar as other employers (*e.g.*, Kitsap Tenant

Services) had mounted the very same challenges well before the issuance of Noel Canning v. NLRB. See AB, page 20, fn. 5. The Board offers no legal authority to support the notion that, in effect, McKenzie-Willamette waived any rights to formulate appropriate defenses once the Supreme Court resolved the controversy related to the recess appointments simply because the Hospital did not previously assert these defenses. In fact, the Court has recently reaffirmed that challenges to the Board's composition may not be waived as part of the proceedings before the agency. See UC Health v. NLRB, 803 F.3d 669, 672-73 (D.C. Cir. 2015).

The simple fact of the matter is that, although the Board was obviously not pleased with the evidence upon the closure of the record, the Board lacked any basis whatsoever to point any finger of blame at the Hospital. Instead, the Board should have held the General Counsel accountable for the oversights that took place, particularly the General Counsel's failure to seek a continuance of the hearing. The Board endeavors to excuse the General Counsel's errors because Counsel for the General Counsel "did not know at the time whether any responsive documents existed" (see AB, page 20, fn. 6), which is, of course, precisely why the General Counsel should have sought a continuance. Likewise, the shortcomings that the Board now perceives with the evidence given its "secondary" nature was all the more reason for the General Counsel to seek a continuance.

In proceedings before the Board, the agency's General Counsel is a litigant no different than any other party (*e.g.*, the respondent) and should not be treated by the Board as immune from the consequences of litigation errors that take place in connection with the General Counsel's prosecution of alleged unfair labor practices.

**2.) The Board's Defense of the Administrative Notice Taken of the Certificate of Appointment and Minute of Board Action is a *Non Sequitur***

In the Principal Brief, the Hospital provided an abundance of case law, from federal courts all over the nation, which showed the Board lacked any basis under the Federal Rules of Evidence, and specifically, under Fed. R. Evid. 201(a), to take administrative notice of the Certificate of Appointment and Minute of Board Action. See PB, page 26. In an attempt to side-step the Hospital's legal authority, the Board grabs hold of Fed. R. Evid. 902 and contends that, because the Certificate of Appointment and Minute of Board Action may be self-authenticated under Rule 902, they should also, at once, be appropriate for administrative notice. Clearly, the Board's contention is a *non sequitur*. Even under the presumption, for the sake of argument, the Federal Rules of Evidence would recognize the documents as what they purport to be (*i.e.*, a Certificate of Appointment and a Minute of Board Action), the Board has no basis, not under the Federal Rules of Evidence or as a matter of logic, to conclude that the documents are automatically

appropriate for administrative notice.[1] Furthermore, even under the presumption, once more for the sake of argument, that the Board had a basis to take administrative notice of the documents, the Board plainly went too far in taking the documents as dispositive of Mr. Hooks' appointment date. As to that key point, the Board did not even confront the Hospital's case law (*e.g.*, McCoy v. Schweiker, 683 F.2d 1138 (8th Cir. 1982)), which evinces the Board's unspoken recognition of the violation of McKenzie-Willamette's rights to a fair hearing.

**3.) The Board's Baseless, *Post Hoc* Characterizations of the Hospital's Motion to Reopen and Efforts to Side-Line the APA Serve Only to Highlight the Abuses of Discretion and the Related Prejudice Suffered by the Hospital**

As part of the proceedings now before the Court, the Board has characterized the Hospital's request for an opportunity to offer evidence of its own on Mr. Hooks' appointment and transfer dates as a request to pursue a "fishing expedition" (see AB, page 26), which is merely a *post hoc* rationalization tossed into the case by the agency's appellate attorneys. See Yukon-Kuskokim Health Corporation v. NLRB, 234 F.3d 714, 718 (D.C. Cir. 2000). In the Decision, the Board did not make any finding that McKenzie-Willamette's request for an

[1] The Board attempts to sweep aside the Hospital's case law (*e.g.*, American Stores Co. v. Commissioner of Internal Revenue, 170 F.3d 1267 (10th Cir. 1999)) on the grounds none of the documents involved in these cases were self-authenticating. See AB, page 25, fn. 11. Yet, the Board does not contend that such a question was even considered by the Court in any of these cases.

opportunity to offer rebuttal evidence was defective in any way, much less term the request a "fishing expedition." In any event, the Board's *post hoc* characterization is not accurate, given the fact the Hospital offered all of the specificity that was possible in the circumstances. McKenzie-Willamette made clear the issue on which the rebuttal evidence would be offered – to wit, Mr. Hooks' appointment and transfer dates – as well as the procedural mechanisms the Hospital planned to use in connection with the development of the evidence. See *e.g.*, Hospital's Opposition to General Counsel's Motion to Reopen the Record, pages 9-10, App. at 279. Additionally, the Hospital made clear the evidence would be sought from the Board's current and former officers. Id. The fact that McKenzie-Willamette could not provide any further specificity arises, of course, from the fact the evidence, by its nature, was solely in the possession of the agency.

Taking the argument one step further, the Board also observes that the Hospital has not presented the Court with any explanation of what evidence the Hospital would have pursued or how the evidence would compel a contrary outcome in terms of Mr. Hooks' appointment and transfer dates. See AB, page 27. Notably, however, the Board has not seized upon the opportunity the agency had before the Court to put to rest any controversy over Mr. Hooks' appointment and transfer dates. The Board did not, for example, represent to the Court that the Certificate of Appointment and Minute of Board Action are the ***only*** documents

related to the timing of Mr. Hooks' appointment and transfer, but rather, asks that the documents be treated as dispositive of the controversy.

Furthermore, the Board has not presented the Court with any explanation as to how the error in Kitsap Tenant Services occurred, and the error is hardly self-explanatory. In Kitsap Tenant Services, the employer clearly and expressly challenged Mr. Hooks' appointment based upon the timing of his appointment. The validity of Mr. Hooks' appointment was no less important in Kitsap Tenant Services, so the Board had every reason to investigate, very carefully, whether Mr. Hooks' appointment took place during the period of time the Board lacked the necessary quorum. The General Counsel, working through capable, experienced attorneys, must have relied upon some document, or some source of information, to confirm a fact of such consequence and McKenzie-Willamette has the right to pursue these documents, together with other documents that show or relate to the date on which Mr. Hooks was appointed and transferred into the position of Regional Director for Region 19 of the Board. The Board's refusal to allow McKenzie-Willamette an opportunity to challenge the General Counsel's evidence was contrary to the agency's own precedent, and by any measure, an abuse of discretion. See *e.g.*, C.F. Taffe Plumbing Co., Inc., 2011 WL 3898011, at * 2 (Board grants motion to reopen the record because the Respondent had not put the General Counsel or the Charging Party on notice at the hearing that the Charging Party's post-

discharge conduct was an issue); Cogburn Health Center v. NLRB, 437 F.3d 1266, 1272 (D.C. Cir. 2006); Dayton Hudson Department Store Co. v. NLRB, 987 F.2d 359, 367 (6th Cir. 1993) (Court remands proceeding to the Board to "ensure a full inquiry" on the contested issue); NLRB v. Lloyd Wood Coal Co., Inc., 585 F.2d 752, 757 (5th Cir. 1978) (Court remands proceeding to the Board because issue on which the employer sought to offer additional evidence was "central" to the case).

The Board's efforts to exclude the Administrative Procedure Act (hereafter, the "APA") from the case are no more persuasive. See AB, pages 27-28. The Board does not deny that, throughout the proceedings before the agency, McKenzie-Willamette consistently requested an opportunity to offer evidence of its own on the timing of Mr. Hooks' appointment and transfer. In relying upon the APA, therefore, the Hospital has not raised a new issue, but rather, pointed to other, further legal authority to support its argument, made all along the way, that, to the extent the Board took notice of evidence that was offered by the General Counsel after the close of the record, the Hospital was entitled to an opportunity to offer contrary evidence of its own. Put another way, the APA is simply part of the legal platform for the positions that the Hospital put before the Board at the very start of the proceedings. For that reason, the Court may, and should, consider the APA. See United States v. Rapone, 131 F.3d 188, 196 (D.C. Cir. 1997); Felter v. Kempthorne, 473 F.3d 1255, 1261 (D.C. Cir. 2007).

In terms of the Board's substantive response to the APA as legal authority supporting the Hospital's position, the Board acknowledges that, given the official notice taken of the Certificate of Appointment and Minute of Board Action, McKenzie-Willamette was entitled to an "opportunity to show the contrary." See AB, page 28. The Board then goes on to argue that, as part of the opportunity to make a contrary showing before the agency, the burden remained with the Hospital to rebut the General Counsel's evidence, which, of course, misses the point entirely. As noted elsewhere, in the wake of the General Counsel's belated proffer of contradictory evidence on Mr. Hooks' appointment and transfer dates, the Hospital simply never had ***any*** opportunity to make a contrary showing on these key facts. Accordingly, consistent with the requirements of Section 556(e) of the APA, the Court should remand the proceedings to the Board so that the Hospital may be afforded the long-overdue opportunity to confront the General Counsel's evidence. See KIRO, Inc. v. F.C.C., 545 F.2d 204, 209 (D.C. Cir. 1976); Union Elec. Co. v. F.E.R.C., 890 F.2d 1193, 1202 (D.C. Cir. 1989); S. California Edison Co. v. F.E.R.C., 717 F.3d 177, 187-88 (D.C. Cir. 2013).

Lastly, McKenzie-Willamette should reaffirm what, by now, must be abundantly clear in any event, specifically, the prejudice associated with the Board's rulings. As the Hospital went into the hearing room on July 8, 2014, the

General Counsel's senior attorneys had represented to a U.S. Court of Appeals that Mr. Hooks' appointment took place during the period of time the Board lacked the quorum required by Section 3(b) of the Act, and during the hearing before the Judge, the General Counsel did not signal even the possibility of any changed view on the timing of Mr. Hooks' appointment. Subsequently, as part of taking the new and contrary position that Mr. Hooks' appointment took place before the onset of the no-quorum period, the General Counsel handpicked supporting documents from the agency's files and strenuously opposed McKenzie-Willamette's efforts to pursue any review of these same, exclusive evidentiary resources. As the proceedings before the agency closed with the issuance of the Decision, the Board rejected the Hospital's requests for an opportunity to pursue evidence of its own on Mr. Hooks' appointment and transfer dates and found these events took place before the no-quorum period based upon the documents proffered by the General Counsel. A more clear-cut case of prejudice is difficult to imagine.

## CONCLUSION

For all the reasons set forth above, McKenzie-Willamette respectfully requests that the Court reject the Board's arguments, grant the Petition for Review and deny enforcement of the Decision.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

   this brief contains 3,144 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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/s/ Bryan T. Carmody
Bryan T. Carmody

**CERTIFICATE OF FILING AND SERVICE**

I hereby certify that on this 8th day of February 2016, I caused this Final Reply Brief, to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users.

/s/ Bryan T. Carmody
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